No. 10-21

In The

Supreme Court of the United States

KEVIN H. McKENNA,

Petitioner,

v.

NESTLÉ PURINA PETCARE COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioner presents the question as, "Will the United States Supreme Court *please* grant the *pro se* petitioner in this case an exercise of this Court's supervisory powers." *Pet.*, p. i [emphasis in original].

A fair reading of the Petition reveals the actual Question Presented is whether the District Court improperly dismissed Petitioner's Complaint and whether the Sixth Circuit improperly affirmed this decision.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Nestlé Purina PetCare Company does not have a parent corporation and there is no publicly held company that owns 10% or more of its stock.

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SUMMARY OF ARGUMENT

Petitioner Kevin McKenna (hereinafter "Petitioner") fails to demonstrate any compelling reason for his Petition to be granted. Petitioner fails to proffer any argument in favor of granting his Petition other than he disagrees with the decisions of the District Court and Circuit Court. This Court settled the issue of proper pleading standards and the District Court and Sixth Circuit followed this Court's precedent. Further, Petitioner does not address how the lower court decisions fail to follow this Court's recent precedent.

The Sixth Circuit's decision does not conflict with the decisions of any other Circuit.

STATEMENT OF THE CASE

Petitioner identifies Ms. Nancy Goss (hereinafter "Goss") as "the perpetrator of *perverse* workplace stalking, sexual and retaliatory harassment victimizing Kevin H. McKenna (McKenna) in and out of the workplace . . . " *Pet.*, p. 2 [emphasis in original]. This is solely Petitioner's view of Goss. Goss and Petitioner were co-workers. Goss contends she and Petitioner engaged in an eleven month sexual affair. Petitioner contends their relationship was "a consensual but restricted, sexually erotic natured *workplace* friendship . . . " *Id.* at p. 4 [emphasis in original]. Petitioner also characterized the relationship as "consensual, sexual/erotic natured, up and down, on and off

again . . . " and as a "sex/sexually oriented work relationship . . . " *Pet. App. Brief*, p. 10 and p. 26. In short, Petitioner attempts to mischaracterize the relationship and avoid referring to it as a sexual relationship. It is clear, however, that Goss and Petitioner were not merely co-workers.

Respondent Nestlé Purina PetCare Company (hereinafter "Respondent") disputes Petitioner's statement, "The essence of this case, is the deliberate criminal actions taken by Nestlé's legal counsel[1] through it's [sic] access to pending Title VII litigation in the Federal Courts . . . " *Pet.* at p. 3. The essence of this case is Petitioner's threat against a material witness in Title VII litigation.

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[1] It should be noted the District Court cautioned Petitioner that his pleadings "move dangerously close to sanctionable behavior. Being a pro se litigant is not a license for McKenna to state and do whatever he wants." *Pet. App.*, p. 11a. The District Court also cited its prior warning to Petitioner:

> However, Mr. McKenna is advised, in the future, to be more temperate in his comments toward the conduct of opposing counsel. If he does choose to make statements impugning the honesty or integrity of such counsel and is not able to support such statements with a factual showing, sanctions may well be imposed in the future.

Pet. App., p. 12a. The Honorable Algenon Marbley concluded, "This serves as McKenna's final warning to temper his comments toward the conduct of opposing counsel. If McKenna continues to impugn the honesty or integrity of opposing counsel without factual support, sanctions will be imposed." *Id.*

During the course of litigation, Petitioner sent Respondent's Counsel an "(admittedly, overly) 'emotional . . . '" and "emotionally distressed . . . " email (hereinafter "the email"). *Pet. App. Brief,* p. 8. The email referenced Goss and posed the question, "Do I have to KILL this BITCH to get her the fuck off me?" *Pet. App.*, p. 2a. Goss previously provided two and half days of deposition testimony that included allegations that she and Petitioner engaged in an eleven month affair that included sexual acts performed in and outside the workplace; that Petitioner informed her he regularly engaged in extramarital affairs; that Goss and Petitioner engaged in sexual acts with another female co-worker; and, that Petitioner requested Goss find a suitable male so that he could experiment sexually. *Pet.*, p. 10; *Pet. App.*, p. 2a and p. 25a. Needless to say, Goss's deposition testimony did not reflect favorably on Petitioner. Petitioner was well-aware that Goss's deposition testimony would be utilized in Respondent's motion for summary judgment, and if the case proceeded to trial Goss would be Respondent's key witness.

Respondent did not request Petitioner send his "emotionally distressed" email but once Respondent received the email it was left with the quandary of what to do with it. In an abundance of caution, Respondent filed a Notice to the Court and attached the email as an exhibit. *Pet. App.*, p. 2a. This Notice was also sent to Goss. Respondent believed the Court and Goss were in a better position to determine whether Petitioner's email was a legitimate threat.

It bears mentioning that on January 8, 2007, Petitioner sent an email to Respondent's Counsel stating " . . . I am losing confidence in my emotional state/capacity, and may need her [Petitioner's wife] help to insure the journey does not end up in some sort of disaster. OH YA, one last thing, note the TIME on this email, yes, it is yet another 'sleepless night' because of this nightmare/atrocity. The INSANITY continues." [emphasis in original]. Petitioner then stated, " . . . I WILL NOT CONFRONT her [Goss] until I have completely resolved to myself that I am literally willing to take her life, in defense of my life, and/or those around me." *Pet. App.*, p. 27a.

After Petitioner states he is losing confidence in his emotional state and states he will resolve himself to taking Goss's life, Petitioner then questions whether he will have to kill Goss. Regardless of Goss's status as a material witness, she was entitled to notice of Petitioner's rants against her. As Judge Marbley noted, Goss was in the best position to determine whether Petitioner's rants were legitimate threats. *Pet. App.*, p. 9a. Apparently, Goss did determine the threat was legitimate and contacted local law enforcement. *Pet. App.*, p. 33a.

Based on Respondent serving Goss with a copy of the email, Petitioner filed a Charge of Discrimination against Respondent with the Equal Employment Opportunity Commission and Ohio Civil Rights Commission (hereinafter "EEOC" and "OCRC"). The EEOC and OCRC found no probable cause to believe discrimination occurred. Petitioner then filed a Complaint

in the United States District Court for the Southern District of Ohio. *Pet. App.*, p. 20a. Respondent filed a motion to dismiss that was granted by the District Court. *Pet. App.*, p. 1a-13a. The Sixth Circuit affirmed the District Court's dismissal of Petitioner's Complaint. *Pet. App.*, p. 14a-18a.

REASONS FOR DENYING THE PETITION

I. The District Court and Sixth Circuit Decision Are In Accord With This Court's Precedent In *Twombly*, *Iqbal*, and *Swierkiewicz*.

Petitioner believes that simply because he proceeded pro se the District Court could not dismiss his Complaint. Pro se plaintiffs are held to lesser pleading standards. *See Estelle v. Gamble*, 429 U.S. 97, 106, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). But, there are standards nonetheless. "Although civil litigants who represent themselves . . . benefit from various procedural protections not otherwise afforded to the attorney-represented litigant . . . pro se litigants are not entitled to a general dispensation from the rules of procedure." *Downs v. Westphal*, 78 F.3d 1252, 1257 (7th Cir. 1996); *see also Moon v. Newsome*, 863 F.2d 835, 837 (11th Cir. 1989) (pro se litigant "is subject to the relevant law and rules of court including the Federal Rules of Civil Procedure"); *Brazil v. U.S. Dept. of Navy*, 66 F.3d 193, 199 (9th Cir. 1995) (Pro se pleadings are subject to Rule 8(a)(2)). Petitioner's Complaint failed to conform to Fed. R. Civ. P. 8(a)(2)

because it did not contain a statement demonstrating an entitlement to relief and was properly dismissed.

Petitioner argues that the District Court disregarded the standards set forth by this Court in *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). *Petition*, p. 25. In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955 (2007), this Court discussed *Conley's* statement that "a complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Twombly,* 550 U.S. at 561, 127 S.Ct. 1955, quoting *Conley*, 355 U.S. at 45-46, 78 S.Ct. 99. As this Court noted, "We could go on, but there is no need to pile up further citations to show that *Conley*'s 'no set of facts' language has been questioned, criticized, and explained away long enough." *Id.* at 562. "The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Id.* at 563. Effectively, *Twombly* abrogated *Conley*. As such, Petitioner's reliance on *Conley* is misplaced. In *Twombly,* this Court stated, "Here, in contrast, we do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Id.* at 570. Petitioner's Complaint did not contain any facts stating a claim for relief that was plausible on its face. Accordingly, the District Court was correct in dismissing Petitioner's

Complaint, and the Sixth Circuit was correct in affirming this dismissal. Accordingly, the Complaint was properly dismissed in accordance with this Court's established precedent.

A mere two years after the decision in *Twombly*, this Court issued its decision in *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S.Ct. 1937 (2009), which was cited by the Sixth Circuit in its decision.[2] *Pet. App.*, p. 15a. In *Iqbal*, this Court recognized that "the pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S.Ct. 1937, 1949 (2009). Petitioner's Complaint was nothing more than "the-defendant-unlawfully-harmed-me accusation." Petitioner failed to set forth any facts demonstrating that Respondent did anything unlawful. Further, Petitioner failed to set forth any facts demonstrating an entitlement to relief.

In *Iqbal*, this Court held:

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the

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[2] Petitioner neglects to cite or discuss either *Twombly* or *Iqbal* in his Petition.

> reasonable inference that the defendant is liable for the misconduct alleged.

Iqbal, 129 S.Ct. 1937, 1949 (U.S. 2009) [internal citations omitted] citing *Twombly*, 550 U.S. at 556, 127 S.Ct. 1955. Petitioner's Complaint did quite the opposite. Instead of containing facts allowing the District Court to draw an inference that Respondent was liable for the misconduct alleged, the Complaint made it clear that Goss was responsible for the misconduct alleged. *Iqbal* is especially applicable to this case as *Iqbal* also considered allegations of discrimination. In *Iqbal*, plaintiff alleged an intent to discriminate, which this Court found to be a conclusory allegation. *Id.* at 1954. This Court noted, "Were we required to accept this allegation as true, respondent's complaint would survive petitioner's motion to dismiss. But the Federal Rules do not require courts to credit a complaint's conclusory statements without reference to its factual context." *Id.*

Courts are required to accept well-pleaded facts as true. In this case, Petitioner pled that Goss filed a criminal complaint against him and the Muskingum County Prosecutor declined to file formal criminal charges. There was no allegation that Respondent filed a criminal complaint. Petitioner concluded, however, the retaliatory action was the filing of false criminal charges. The allegations of the Complaint do not support this because they specifically state that no charges were filed. Further, Petitioner does not dispute that he sent an "emotionally distressed" email that referenced Goss and questioned whether he

would have to kill her. This email was not false. Likewise, Goss's reaction to this email was not false – she filed a criminal complaint. Under *Iqbal*, Petitioner was required to articulate facts that show he was entitled to relief. Petitioner utterly failed. To the contrary, the articulated facts clearly demonstrated that Petitioner was not entitled to any relief. The District Court and Sixth Circuit complied with the standards set forth in *Iqbal* when dismissing Petitioner's Complaint.

This case presents no novel issues for this Court to decide. The Petition only evidences Petitioner's disagreement with the District Court and Circuit Court's decisions. It is clear that Petitioner's Complaint contained numerous factual allegations, but Petitioner's Complaint demonstrated no entitlement to relief. Instead of being replete with legal conclusions, Petitioner's Complaint contained no legal basis at all. Petitioner merely recited facts and these facts could not support a claim for retaliation. The District Court correctly noted that "'factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true.'" *Pet. App.*, p. 5a-6a, quoting *Twombly*, 550 U.S. at 544. Petitioner fails to address *Twombly* or *Iqbal* and fails to assert how the District Court and Sixth Circuit failed to comply with established precedent. For this reason alone, the Petition should be denied.

Instead of arguing proper pleading standards, Petitioner argues that "claims lacking merit may be

dealt with through summary judgment under Rule 56." *Pet.*, p. 26. Petitioner's argument is akin to the "careful case management approach" argument, which this Court flatly rejected. *Twombly*, at 559, 127 S.Ct. 1955. Petitioner omits any discussion of Fed. R. Civ. P. 8(a)(2), which requires a pleading contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed R. Civ. P. 8(a)(2). Further, Petitioner does not advance any argument that the Sixth Circuit departed from the standards set forth in *Twombly* and *Iqbal*.

Even more problematic for Petitioner is that the Sixth Circuit specifically cited to *Twombly* and *Iqbal* in rendering its decision. Further, the Sixth Circuit noted that pro se pleadings "'are liberally construed when determining whether they fail to state a claim on which relief can be granted.'" *Pet. App.*, p. 15a, quoting *Martin v. Overton*, 391 F.3d 710, 712 (6th Cir. 2004). Obviously, the Sixth Circuit was well-aware of this Court's teachings in *Twombly* and *Iqbal* when rendering its decision and was cognizant of Petitioner's pro se status. The Sixth Circuit did not depart from established precedent in affirming the dismissal of Petitioner's Complaint.

In *Twombly*, this Court also discussed *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002), which Petitioner relies upon. Petitioner argues the dismissal of his complaint does not comport with this Court's decision in *Swierkiewicz*. As this Court noted, *Swierkiewicz* did not change the law of pleading. *Twombly*, 550 U.S. at

569-570. In *Swierkiewicz*, this Court reversed the dismissal of a Title VII complaint that contained allegations related to events leading to plaintiff's termination, included relevant dates, and included the ages and nationalities of individuals involved in the termination. *Id.* at 570. Despite these allegations, the complaint was dismissed for failing to allege facts the plaintiff would need at the trial stage to support a claim. *Id.*

Petitioner's Complaint failed to allege any facts demonstrating an entitlement to relief. Such is the case with many complaints filed in the many District Courts in the United States. The dismissal of Petitioner's Complaint was not novel and was not based on a departure of established law. There is simply nothing remarkable about this case that would warrant this Court exercising jurisdiction. *Swierkiewicz* does not support Petitioner's arguments because the Sixth Circuit determined Petitioner "has not sufficiently alleged facts showing that Nestlé was responsible for a materially adverse action taken against him." *Pet. App.*, p. 17a. Put another way, Petitioner did not comply with Fed R. Civ. P. 8(a)(2) and demonstrate he was entitled to relief.

In *Swierkiewicz*, this Court stated that an employment discrimination complaint need not set forth facts establishing a prima facie case. "We hold that an employment discrimination complaint need not include such facts and instead must contain only 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Swierkiewicz*, 534

U.S. at 508. *Swierkiewicz* did not alter the requirement that a complaint demonstrate an entitlement to relief, which this Court recognized in *Twombly*. Granting Petitioner's request for review requests this Court to revisit its prior holding. Further, it is clear from Petitioner's Complaint that he did not show that he was entitled to relief. The District Court determined that Petitioner's Complaint was founded upon the filing of false criminal charges against him. The District Court noted that a review of the Complaint revealed no allegation that Respondent ever filed criminal charges against Petitioner. *Pet. App.*, p. 6a. To the contrary, Petitioner's Complaint specifically alleged Goss filed a criminal complaint against Petitioner. *Id.* The Sixth Circuit's decision does not conflict with *Swierkiewicz* because the Sixth Circuit did not require Petitioner to include facts establishing a prima facie case of retaliation.

The District Court also determined that Petitioner could not succeed on his retaliation claim because there was no allegation that false criminal charges were ever filed. *Pet. App.*, p. 7a. Again, the allegations of Petitioner's Complaint defeat any claim based on the filing of false criminal charges because Petitioner specifically alleged that no criminal charges were filed. *Id.* Further, the District Court's ruling determined that Petitioner could not establish that Respondent took any adverse action against Petitioner because Petitioner specifically alleged that Goss was the only individual that took any action against him. From the facts alleged in Petitioner's

Complaint, it was clear Petitioner did not state a claim entitling him to relief.

The Sixth Circuit specifically determined that Petitioner "failed to state a claim for retaliation because he has not sufficiently alleged facts showing that Nestlé was responsible for a materially adverse action taken against him." *Pet. App.*, p. 17a. The Sixth Circuit did not affirm dismissal because Petitioner failed to plead a prima facie case of retaliation. Rather, the Sixth Circuit affirmed dismissal because Petitioner failed to set forth facts demonstrating an entitlement to relief. Had Petitioner simply alleged that Respondent caused a criminal complaint to be filed against him because he engaged in protected activity then arguably such allegations would have withstood a motion to dismiss. Petitioner, however, clearly alleged that Goss filed a criminal complaint against him, not Respondent. The Sixth Circuit's decisions comports with *Swierkiewicz*, which did not alter pleading standards but merely determined that heightened pleading was not required in employment discrimination complaints.

In *Swierkiewicz*, this Court stated, "This case presents the question whether a complaint in an employment discrimination lawsuit must contain specific facts establishing a prima facie case of discrimination set forth by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)." *Swierkiewicz*, 534 U.S. at 508. This Court then held, "We hold that an employment discrimination complaint need not include such facts and

instead must contain only a 'short and plain statement of the claim showing that the pleader is entitled to relief.'" *Id.* citing Fed R. Civ. P. 8(a)(2). In *Swierkiewicz*, this Court considered the Second Circuit's decision that affirmed the dismissal of a complaint because the allegations were "insufficient as a matter of law to raise an inference of discrimination." *Swierkiewicz v. Sorema, N.A.*, 5 Fed.Appx. 63, 65 (2d Cir. 2001). In this case, Petitioner's allegations were not insufficient. Rather, Petitioner's allegations sufficiently demonstrated that he could not state a claim upon which relief could be granted. While Petitioner was not required to assert facts establishing a prima facie case of retaliation, the District Court was not required to permit this case to proceed to discovery when it was clear Petitioner could not establish a prima facie case of retaliation regardless of the facts developed through discovery.

It is the employee's burden to present evidence that raises an inference of discrimination. *See Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-253, 101 S.Ct.1089, 67 L.Ed.2d 207 (1981). While a plaintiff need not set forth facts clearly establishing all elements of a prima facie case to survive a motion to dismiss, if the complaint makes it clear that the plaintiff cannot establish a prima facie case then a court must grant a motion to dismiss. "A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v.*

King & Spalding, 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984).

This Court settled the standard of proper pleading in a discrimination complaint and the District Court and the Sixth Circuit properly followed this standard. Neither Court required Petitioner to include specific facts establishing a prima facie case. Instead, both Courts determined that the facts Petitioner alleged clearly demonstrated Petitioner could not establish the essential elements of a claim for retaliation.

The District Court and Sixth Circuit's decision follow this Court's precedent in *Twombly* and *Iqbal*, which require a complaint comply with Fed. R. Civ. P. 8(a)2) and show the pleader is entitled to relief. Petitioner's Complaint did not show that he was entitled to relief and was properly dismissed.

II. This Court Settled Issues Related To Proper Pleading Standards And Petitioner Advances No Argument The Sixth Circuit Did Not Follow These Standards.

The arguments contained *infra* are precisely why this Court should not accept jurisdiction. The parties are arguing whether Petitioner's Complaint was properly dismissed; the parties are arguing proper pleading standards; the parties are not arguing for an extension or retraction of existing law or requesting this Court resolve a split amongst the Circuit Courts. Petitioner fails to recognize that this is the United

States Supreme Court. This is not the proper forum to simply rehash arguments already made to the lower courts and properly analyzed by the lower courts in accordance with well-established precedent simply because Petitioner disagrees with the rulings of the lower courts.

This Court settled the issue of what is the proper pleadings standard, and did so recently in two separate decisions. Granting Petitioner's Writ would result in revisiting this Court's decisions in *Twombly* and *Iqbal*. Petitioner attempts to cast this case in the light of a District Court and Appellate Court departing from established standards of review, but Petitioner fails to address *Twombly* or *Iqbal*. Petitioner fails to assert any compelling reason for this Court to review the Sixth Circuit's decision.

Petitioner's position would render courts powerless to dismiss a complaint filed by a pro se plaintiff. Petitioner's appeal to this Court that as a pro se plaintiff his Complaint must stand is as meritless as Petitioner's argument that if he were African-American and the presiding District Court Judge was white (instead of vice-versa) then the outcome of this case would have differed and had it not, there would have been national riots. *Pet. App. Brief*, p. 23. Petitioner's reasoning leads to the inevitable result that a court could never dismiss a Title VII Complaint because courts would not be permitted to evaluate whether a plaintiff could state a claim. Granting the Petition would result in holding employer's liable for acts of former employees. The actions of former

employees are impossible to police and restrict as employers have no control over them, just as Respondent had no control over Goss. Further, granting the Petition would restrain a litigant's ability to inform a witness of a potential threat against that witness.

III. The Sixth Circuit's Decision Does Not Conflict With The Decision Of Another Circuit Court.

In an attempt to convince this Court to accept the Petition, Petitioner argues that the Sixth Circuit's decision conflicts with the decision of the Tenth Circuit Court of Appeals in *Berry v. Stevinson Chevrolet*, 74 F.3d 980 (10th Cir. 1996). In *Berry*, Jerald Reynolds (hereinafter "Reynolds") was employed by defendant as a new car sales manager. During this time, two co-workers were allocated bonuses; Steve Szekula (hereinafter "Szekula") was one of these co-workers. Szekula left employment with defendant prior to receiving his bonus. Reynolds paid Szekula the bonus out of his own pocket and on or about May 4, 1989, instructed a secretary to endorse Szekula's name on the bonus check once it arrived. Reynolds then cashed the bonus check. *Id.* at 983.

In August 1989, defendant terminated Reynolds. In February 1990, Reynolds met with Szekula for lunch and informed Szekula he was contemplating filing an EEOC Charge of Discrimination against defendant. *Id.* at 984. Contrary to customary hiring

practices and despite Szekula's file being flagged with a "not for rehire" notation, defendant's owner rehired him and offered him a management position.

Reynolds filed a Charge of Discrimination on March 1, 1990. *Berry v. Stevinson*, 804 F.Supp. 121, 129 (D. Colo. 1992). The defendant received notice of the Charge on March 7, 1990. *Id.* at 130. On March 30, 1990, Szekula contacted the Sheriff's office to complain of forgery related to the bonus check. Criminal charges were then filed against Reynolds and he was ultimately acquitted. Reynolds filed a retaliation claim that proceeded to trial.

The factual distinctions between *Berry* and the present case are evident. Szekula worked for defendant and was under the control of defendant when he filed the forgery complaint. Goss had not worked for Respondent for over two years when she filed the criminal complaint against Petitioner. Further, the Tenth Circuit's decision in *Berry* focuses on whether a former employee may bring a claim for retaliation. *Berry*, 74 F.3d at 985. There is no dispute in this case that a former employee can bring a claim of retaliation. *Berry* simply did not confront the issue of whether a former employee can bring a claim for retaliation when the alleged retaliatory action was taken by another former employee. As such, the Sixth Circuit's decision is not at odds with *Berry* and there is no conflict.

The Tenth Circuit later clarified its decision in *Berry* and stated, "Filing false criminal charges

against, or the malicious prosecution of, an employee can constitute an adverse employment action." *Dick v. Phone Directories Co., Inc.*, 397 F.3d 1256, 1269 (10th Cir. 2005). In *Dick*, the Tenth Circuit determined the plaintiff could not establish any adverse action was taken against her because co-workers complained to the police department but "no formal charges have been brought against her." *Id.* The Tenth Circuit stated, "We agree with the reasoning of the District Court and hold that the police report in this case is not an adverse employment action." *Id.* Unlike the facts of *Berry*, the facts of *Dick* are similar to the facts of this case and the court determined no adverse action was taken. Despite Petitioner's arguments, the Tenth Circuit's decisions are in line with the Sixth Circuit's decision in this case.

There would be no claim for retaliation even if Respondent, instead of Goss, filed the police report. A truthful report to police about an employee does not constitute adverse action to support a retaliation claim. *Aviles v. Cornell Forge Co.*, 241 F.3d 589, 593 (7th Cir. 2001). Even if the facts of this case were different and Respondent itself filed the police report, Petitioner could not have stated a claim for retaliation.

IV. The Court Should Not Withhold Ruling Pending The Outcome Of *Staub v. Proctor*.

Petitioner requests this Court withhold any ruling in this case until a decision is rendered in *Staub*

v. Proctor, Case No. 09-400. It is perhaps fitting that a case in which Respondent, a pet food manufacturer, is involved has now been linked to a fable involving a monkey and a cat. It is also not surprising that Petitioner is now knocking on the door of the highest court in the land given Petitioner's prior representation:

> Be it said and heard, here and now: Regardless of the pain and suffering my family and I have, and continue to endure(d) regarding this discrimination lawsuit, so long as blood flows through my veins, and breath through my lungs, I shall never cower to this TYRANNY that is known as "Nestle."

Pet. App. Brief, p. 30 [emphasis in original].

Petitioner's attempt to fit the facts of this case into the "Cat's Paw Theory" is misguided, at best. As this Court is well-aware, the Cat's Paw Theory is derived from the "Monkey and the Cat" fable authored by Jean de La Fontaine. *Staub v. Proctor Hosp.*, 560 F.3d 647, 650 (7th Cir. 2009). In this fable, the clever monkey persuades the unsuspecting cat to snatch chestnuts from a fire. In doing so, the cat burns its paws and the monkey enjoys the chestnuts.

The Cat's Paw Theory now refers to a means of proving discrimination when the actual decisionmaker is unbiased, but the discriminatory animus of a nondecisionmaker is imputed to the decisionmaker. The unsuspecting decisionmaker (the cat) has now carried out the unlawful motives of the

nondecisionmaker (the monkey). There are, of course, varied applications of the Cat's Paw Theory among the Circuit Courts.

Petitioner claims the facts of this case are similar to the issues this Court will confront in *Staub*. There is, however, nothing similar in these cases. In *Staub*, petitioner alleged he was discriminated against based on his military service. *Id.* The case proceeded to trial. At trial, Staub produced evidence of the discriminatory animus of his supervisor. Staub produced evidence that actions taken by this supervisor influenced his ultimate termination.

Petitioner cannot point to any discriminatory conduct by Respondent, there is no supervisor, and there is no decisionmaker under Respondent's control. In this case, Goss, who was not an employee of Respondent at the time, filed a criminal a complaint against Petitioner. Respondent did not file this criminal complaint against Petitioner; Respondent's Counsel did not file this criminal complaint against Petitioner; and, there is no allegation that Respondent possessed any control over Goss. A non-party over whom Respondent had no control filed a criminal complaint against Petitioner. There was no fabled monkey directing Goss to file these charges, which is made clear by Petitioner's Complaint. As such, there is no justification for withholding ruling on this case pending the outcome of *Staub*.

V. Petitioner Attempts To Raise Issues Not Addressed By The Lower Courts.

Petitioner attempts to raise issues regarding Respondent's harassment of Petitioner. *Pet.*, pp. 10-12. These issues were not raised in front of the District Court or the Circuit Court and not addressed by the lower courts. This Court routinely declines to decide issues not raised in the lower courts. *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109 (2001). Accordingly, Respondent requests this Court not address issues not raised in the lower courts the Petitioner attempts to raise in his Petition.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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